No. 7454

In the

# United States Circuit Court of Appeals

For the Ninth Circuit

Asa B. Cutler and Frank W. Cutler, co-partners, doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon Corporation, Food Machinery Corporation, a Delaware Corporation, formerly known as John Bean Manufacturing Company, F. W. Cutler, Director, General Agent and Attorney in Fact within the State of Oregon, for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

*Appellants*

*vs.*

Floyd J. Cook

*Appellee*

Upon Appeal from the District Court of the United States for the District of Oregon.

## Appellee's Petition for Rehearing


Carey, Hart, Spencer and McCulloch
Omar C. Spencer
Fletcher Rockwood
*Attorneys for Appellee*


FILE

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ASA B. CUTLER and FRANK W. CUTLER, co-partners, doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon Corporation, FOOD MACHINERY CORPORATION, a Delaware Corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon, for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

*Appellants*

*vs.*

FLOYD J. COOK

*Appellee*

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Upon Appeal from the District Court of the United States for the District of Oregon.

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## Appellee's Petition for Rehearing

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Floyd J. Cook, plaintiff and appellee herein, petitions this Honorable Court for a rehearing of this cause upon the following grounds:

The decision of this Court filed August 5, 1935, is erroneous because based upon an incorrect understanding of the evidence and the applicable decisions with respect to the contract dated May 4, 1928. The decision holds that the contract came to an end upon the sale of appellants' business to a third party, which sale occurred on March 29, 1930. In reaching this conclusion the Court apparently misunderstood the record in the following essential particulars:

1. The Court failed to take into account the essential surrounding circumstances and the real intention of the parties when the contract dated May 4, 1928, was made.

2. The Court, in holding that the parties intended that the contract dated May 4, 1928, was to be terminated upon the sale of appellants' business to a third party, seems to have misunderstood the real purpose of the contract.

3. Because of the matters specified under 1 and 2 above, the Court has failed to apply the two applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

CAREY, HART, SPENCER AND McCULLOCH,
OMAR C. SPENCER,
FLETCHER ROCKWOOD,
*Attorneys for Appellee.*

## CERTIFICATE OF COUNSEL

We, the undersigned, counsel for appellee in the above entitled cause, do hereby certify that in our judgment the foregoing petition for rehearing is well founded and that said petition is not interposed for delay.

Omar C. Spencer,
Fletcher Rockwood,
*Counsel for Appellee.*

## ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

### I.

**Restatement of the Question Considered by the Court to be Controlling.**

We present this petition for rehearing with a frank apology for the manner in which the question, considered by the Court in its decision to be controlling, was treated in appellee's brief. The disposition of the case required the interpretation of a written contract. In our brief we discussed this question of interpretation in quite an abstract manner, relying principally on two decisions of the Supreme Court of the United States which we thought were decisive. Apparently we relied too much upon the effect of these decisions and too little upon a detailed analysis of the contract and of the facts and circumstances showing the intention of the parties. Our confidence in the two decisions of the Supreme Court which we cited and thought controlling, which decisions had been accepted and followed by the Master in Chancery and by the District Court, was increased by the fact that appellants cited no authority to support the position urged in their brief. We have a strong conviction that our failure to discuss the facts in more detail with respect to the contract and the intention of the parties, has resulted in a decision which is erroneous and

which, if adhered to, will lead to grave injustice.

The decision rests solely on the interpretation of Paragraph 11 of the written contract dated May 4, 1928, between appellee and appellants, F. W. Cutler and A. B. Cutler, copartners doing business under the name of Cutler Manufacturing Company. By the contract, appellee granted to the Cutlers the exclusive license to manufacture fruit graders under appellee's patent. The Cutlers, in turn, promised to manufacture and promote the sales of appellee's device, and further, to refrain from manufacturing any competing machine. The contract was for a five-and-a-half year term, to expire on October 1, 1933, with provisions for termination upon the happening of certain events on October 1, 1931. The undisputed fact is that the Cutlers ceased to manufacture and distribute appellee's device in the spring of 1930. At that time appellee did nothing which could be construed as a consent to the release of the Cutlers from their obligation to perform for the full term stated in the contract. The Master and the District Court held that the cessation by the Cutlers in 1930 was a breach of contract and awarded damages to appellee accordingly. This Court has held that the suspension in the spring of 1930 was not a breach of contract on the part of the Cutlers and that consequently appellee was not entitled to recover damages from appellants.

Paragraph 11, upon which this Court based its conclusion, reads as follows:

> "Eleventh: If during the term of this contract the company (meaning appellants F. W. Cutler and A. B. Cutler as co-partners) shall sell its business, the second party (that is, the appellee) shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company."

The facts are that the Cutler partnership (and its successor, Cutler Manufacturing Company, Inc.), in the spring of 1930, sold its entire business and its manufacturing plant in Portland, exclusive only of the contract with appellee, to appellant Food Machinery Corporation; that appellant Food Machinery Corporation was unwilling to accept an assignment from the Cutlers of the rights and obligations of the contract with appellee except upon a basis substantially different from the contract as drawn( that is, with the provision forbidding the manufacture of competing machines eliminated), and that appellee was not willing to accept performance by Food Machinery Corporation in a manner substantially different from that which he was entitled to receive from the Cutlers, with whom he had contracted. What then, in those circumstances, were appellee's rights?

The Master and the District Court, considering paragraph 11, held that appellee had the right (1) to insist on performance by the Cutlers, and if the Cutlers failed to perform, to recover damages for the breach; or (2) to make an agreement with the purchaser, Food Machinery Corporation, whereby the purchaser should continue to manufacture and distribute appellee's graders; or (3) to cancel and terminate the contract. This Court, construing the contract, held that appellee had only the last two alternatives, that the rights thus given in the last two alternatives were exclusive, and that appellee did not have the first alternative right, that is, to recover damages for failure by the Cutlers to perform the contract.

The Court, at page 4 of the pamphlet copy of the decision, states as follows:

> ". . . The primary question then is, did the defendants breach the contract by a sale of their business to the Food Manufacturing Corporation without a sale or assignment of the license contract?"

The Court, at page 6, uses this further language:

> ". . . While it is true that the contract did not expressly give the Cutlers a right to terminate the contract in the case of the sale of their business . . ."

The Court concludes that the sale by the Cutlers of their business and the suspension of performance by the Cutlers of the license contract was not a

breach of contract by the Cutlers, and thus reads into the contract a right in the Cutlers to terminate the contract by conduct entirely within their own control.

The right in a promisee to damages for failure of a promisor to perform his promise (in this case, the promise to manufacture and distribute Cook graders for the term specified in the contract) is a right which the law gives, and it is unnecessary to find an expression of that right in the contract itself. The effect of the decision, then, is that the Court, by interpretation, grants to appellants a right not expressed in the contract, and denies to appellee the right which the law allows, whether or not expressed in the contract.

The true intent of the contract, and particularly of paragraph 11, becomes apparent by consideration, first, of the rights of the parties if paragraph 11 had not been inserted in the contract, and, second, the circumstances and reasons for inclusion of the paragraph in the contract.

## II.

### Rights of the Parties If Paragraph 11 Had Not Been Inserted.

In the first place, if paragraph 11 had not been included in the contract, there can be no question but that upon sale by the Cutlers of their business

and suspension of the production and sale of appellee's device without appellee's consent, the Cutlers would have been answerable to appellee for damages.

The contract would have been merely this: Appellee granted an exclusive license to the Cutlers to manufacture under his patent, and the Cutlers promised to manufacture and distribute for the term specified. Unless the contract had contained a specific clause giving the Cutlers the right to terminate prior to the expiration of the term, the Cutlers would have been answerable to appellee in damages if for any reason they had failed to perform their promise. If paragraph 11 had been omitted, the Court would not have read into the contract (as it has actually done in its decision) a privilege in the Cutlers to terminate at their pleasure.

Secondly, even without paragraph 11, if the Cutlers had sold their plant to a third person and had attempted to assign the Cook contract to the purchaser, appellee could, of course, have made a new contract with the purchaser. If appellee had been satisfied to accept performance by the purchaser and to release the Cutlers, and if the purchaser had been willing to assume the Cutlers' obligations, the parties, of course, could have made a novation. That right in appellee to make a novation is the right in terms given to him in paragraph 11, under which he could

> "require that the purchaser from the company shall assume and discharge all the company's obligations hereunder."

As the decision of the Court points out, at page 6, the parties to the contract could not bind a purchaser in advance to assume the contract, and the right thus expressed in paragraph 11 was by its nature contingent upon the consent of the purchaser. So, too, if the paragraph had been omitted, the right to make a novation would have been contingent upon the consent of the purchaser. Consequently, the inclusion of the language in paragraph 11, next above quoted, gave appellee no right other than that which he would have had, had the paragraph been omitted.

In the third place, if paragraph 11 had not been included, and if the Cutlers had by their voluntary act sold their business and divested themselves of their means of performing the contract and had thereupon ceased to perform their promise, that would have constituted a repudiation by the promisor; and by the application of well established rules, appellee, the promisee, would thereby have been excused from further performance of obligations imposed on him, and could have treated the contract as terminated. This is particularly true in view of the language of paragraph 8 of the contract giving to either party the right "to cancel and terminate this agreement" upon breach of contract by the other party.

(R. p. 128). Thus, even without the specific grant by paragraph 11 of the right

> ". . . to cancel and terminate this agreement and put an end to all the company's rights . . ."

appellee would have had the right, in the circumstances assumed, to terminate the agreement. Likewise, in that situation, in the absence of a specific clause giving the Cutlers the right to assign the contract and compelling appellee to accept performance from whatever assignee the Cutlers might select, the appellee, without paragraph 11, had the power

> ". . . to prevent any rights hereunder from passing to such purchaser from the company."

It follows then that if paragraph 11 had not been inserted, the rights of appellee, in the event that the Cutlers had sold their business and by that voluntary act had divested themselves of the instrumentality essential to continued performance, and had thereupon ceased to perform, would have been as follows:

(1) He could have considered the contract as still in effect and could have sued and recovered damages for breach by the Cutlers; or

(2) He could have made a novation with the purchaser, if the purchaser was willing; or

(3) He could have treated the contract as cancelled and terminated for all purposes.

It is to be noticed that these three alternatives are the identical rights which appellee contends were

available to him with paragraph 11 in the contract. The Court recognizes that under that paragraph he had the second and third right, but denies to him the first.

## III.

### Rights of Appellee Under Paragraph 11.

The question then is whether, by the very inclusion of paragraph 11, appellee's rights were restricted, to eliminate (1) the right to treat the contract as still in effect and to recover damages, and to confine his right either to (2) the privilege of negotiating a novation, or (3) the privilege of cancelling the contract.

If the parties had so intended, there is no question but that, by specific language giving the Cutlers the right to terminate the contract in the event of a sale of their business, the parties could have granted to the Cutlers the right to terminate without liability to appellee, and by that means have barred appellee's right to damages in the event of sale by the Cutlers and cessation of performance. The Court has said that that was the intent of the contract; but to reach that conclusion the Court has been forced to read into the contract a provision not stated, and which the Court recognizes was not expressly stated, that is, a right in the Cutlers to terminate without liability. And in so doing, the Court, by the same

token, has been forced to strip the contract of the normal incident, uniformly allowed by law without express statement, that is, the right of a promisee to recover damages upon failure of the promisor to perform his promise. We respectfully submit that the Court, under the guise of interpretation, has altered the contract, and has drawn erroneous inferences with respect to the intent of the parties.

If the language of a contract is ambiguous, the court may consider parol evidence of the negotiations leading up to its execution, not for the purpose of varying its terms, but as an aid in its construction. (*Ryan v. Ohmer,* 244 Fed. 31; *E. H. Stanton Co. v. Rochester German Underwriters Agency,* 206 Fed. 978 (by Rudkin, J.); *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.,* 132 Fed. 957). We had not supposed that the language was ambiguous, when read in the light of the authorities we cited in our brief; but for present purposes, we will accept the statement of appellants' counsel, wherein, in referring to paragraph 11, they said:

> ". . . It is ambiguous and might be construed in several ways." (Appellants' Brief, p. 37).

Consequently we look to the parol evidence for assistance in its interpretation.

Paragraph 11 is the final paragraph of the contract as executed. (R. pp. 130-131). The agreement was dated May 4, 1928. (R. p. 121). The subject

matter of the paragraph was first discussed on May 3, after all other matters had apparently been agreed upon. The discussions which led up to this last minute insertion were related by appellant F. W. Cutler, as follows:

> ". . . On the morning of the 3rd he came to my office, much to my surprise, and said that he had discussed the proposed agreement with his attorney and a point had been called to his attention that he wanted to take up with me before he went on with the contract. Mr. Cook said 'There is no minimum provided, minimum royalty provided in the contract. You don't have to pay anything if you don't make sales, *and there is nothing in the contract about your selling out to anybody. Where would I be if you should sell out to somebody?'* I cannot give you exactly word for word the conversation, but what I have said is the substance of was (what) was said there. I recall distinctly Mr. Cook saying, 'Well, the way the contract is agreed on now *all you have to do is incorporate and you could get out of it and shelve me.'* I said, 'Well, Mr. Cook, if you have—in the first place, *I don't think we could get away with anything like that,* because it would appear to me to be collusion just simply to avoid the contract; *I don't think we could get away with it legally,* but in the second place, if you have any such lack of confidence in us as to think that we would try to *pull a thing like that* after making a deal with you, why, we better not deal at all.' 'Well,' he said, 'that is all right, but my attorney said we ought to have something in there about your selling out to somebody.' I attempted to dissuade Mr. Cook from going further with the negotiations, because

it had been drawn out so long as it was I was getting to—being busy—to an end of patience in the matter in a way. *I didn't think it was necessary; I assured him that we had no intention of selling out, had no plans for such a thing,* but he still persisted in some clause that would give him what he thought he should have. I said, 'Well, now, it is all right with me, then, if you will have your attorney add a clause to the agreement we have now got that if you don't like any purchaser—anybody that we might sell our business to'—he brought that point up before, that he might not like the next fellow; he had confidence in us, but he might not like the purchaser—I said, 'If you can't make a deal with the purchaser and don't like him, you can put a provision in the contract that you can take your rights back under the license, under your patent.'" (Record, pp. 153-154.)

Mr. Cutler testified further:

> "The discussion, as I have already testified, was that we did not expect to sell out, but there was no discussion that there was a bar being planned for that contract." (Record, p. 155).

Based upon that discussion, and with the intent and purpose thus disclosed, paragraph 11 was prepared by the attorney selected by appellee and the contract as thus supplemented was executed.

The positive intent of appellee was to secure by paragraph 11 some protection and rights which he would not otherwise have had. Appellee had no purpose to give the Cutlers broader rights than they would otherwise have had; and the Cutlers were not

seeking any advantages in addition to those conferred by the contract without paragraph 11. Appellee wanted that clause for his own benefit. F. W. Cutler thought it was unnecessary because the Cutlers had "no intention of selling out", and Cutler believed that the Cutlers could not "get away with it legally" to sell and thereby "shelve" appellee, and indicated that appellee should not be so lacking in confidence in the Cutlers as to believe they "would try to pull a thing like that."

And yet the result of this Court's decision is to say that the paragraph, inserted for the very purpose of preventing the Cutlers from "shelving" appellee, indicates an intent by the parties to permit the Cutlers to do that very thing, that is, to sell the instrumentality essential to performance and to terminate the contract and release themselves without appellee's consent. Thus this paragraph, inserted for the purpose of protecting him in the enjoyment of his rights under the contract, under the decision of the Court conferred on the Cutlers the privilege to sell their plant whenever they chose, and, if appellee could not prevail on the purchaser to enter into a new contract by way of novation, to leave appellee without any remedy, that is, to "shelve" appellee.

It is error, we respectfully submit, to read into a particular clause, inserted for appellee's benefit for the purpose of broadening his rights, an intent to

restrict and cut down his rights, unless that result is inevitable. That result is not inevitable and the language of paragraph 11 does not compel the conclusion that the parties thereby intended that the Cutlers should have the right to terminate the contract at their pleasure, and that appellee should surrender his rights to damages in the event of sale by the Cutlers and their refusal to perform further. (See *Western Union Telegraph Company v. Brown,* 253 U. S. 101, 40 S. Ct. 460, cited in our opening brief, pp. 12-15, and discussed again in later pages).

Furthermore, the Cutlers, even after they had sold their business and suspended the manufacture and distribution of appellee's device, believed that they were still obligated to perform. Shortly before April 5, 1930, Cutler Manufacturing Co., Inc., had been formed and had succeeded to the partnership assets, including the Cook contract. On April 5, 1930, the Cutler Corporation wrote to appellee:

> "We desire to give you notice that the Cutler Manufacturing Company, Inc., has taken over the business and assets of the Cutler Manufacturing Company, co-partnership." (R. p. 159).

In explaining the purpose of that letter, appellant

F. W. Cutler testified as follows:

> "It was my idea that Cook would have the right to cancel his contract if we sold out . . . We had incorporated in this case here but we didn't intend to get out of the deal. The purpose of the

> letter was to tell Cook he would have the right, if he wanted, to cancel the contract. It was up to him. If he didn't cancel it the Cutler Manufacturing Co., I believe, *would have to carry it along.*" (R. p. 159).

Again, in the face of this admission that appellants, as late as the spring of 1930, interpreted the contract as binding on them despite the fact of a sale of the Cutler business, the Court's decision reads into the contract a right in the Cutlers to terminate the contract, and finds as a fact that the parties intended that the Cutlers should have the right to terminate the contract at their pleasure, and thereby "shelve" appellee, by the simple device of disposing of the instrumentality essential to performance by the Cutlers.

The right which appellee asserts, is entirely consistent with the rights and powers (as distinguished from rights) which the Cutlers admittedly had under the contract. When the Cutlers had under consideration the matter of the sale to Food Machinery Corporation, the alternatives which faced them were as follows: If they wished to avoid liability for damages for breach of their contract with appellee, they could refrain from making the sale and proceed with the performance of the contract. On the contrary, if the benefit which they would receive from a sale to Food Machinery Corporation would be greater than

the detriment to them upon their liability to appellee, they could make the sale, pay appellee his damages, and still be in a more favorable position. The Cutlers had it within their power to choose between either of these two alternatives. The matter was entirely beyond the control of appellee. The mere fact that the parties recognized the power (as distinguished from right) in the Cutlers to sell their business and breach their contract, does not indicate any intention of the parties when the contract was made that the Cutlers could do so with impunity and without liability to the appellee for that breach.

The Court, at page 6 of the pamphlet copy of the decision, states:

> "The contract of May 4 is predicated upon the manufacturing plant of the Cutlers and upon their distribution of their manufactured products. It was obvious to the parties when they entered into a contract that when these facilities were sold to a third person, the Cutlers would be unable to carry out the contract in the manner contemplated by the parties at the time the contract was entered into."

The testimony of F. W. Cutler, quoted in earlier pages, shows that the possible sale to a third person was not the primary concern of the parties. Cook was seeking some protection, not primarily against the contingency of a sale to some outside party, but rather against the results of the incorporation of the business then conducted by the partnership. But even

though the primary concern of the parties was to protect appellee in the event of a sale to a third party, the conclusion of the Court, that appellee thereby intended to surrender any right which the law gave him in the event of a breach, is erroneous.

At pages 4 and 5 of the printed decision, the Court says:

> "The contract recognizes that such a sale of the manufacturing business would materially affect both parties to the contract. For that reason the subject is dealt with in the contract, although it was otherwise irrelevant. Is it a fair construction of clause 11 of the contract that in case the Cutlers sold their general manufacturing business to a third party they must erect a new plant and continue to exploit the plaintiff's machine? Clearly the parties contemplated no such extraordinary procedure in the event of such a sale."

It is undoubtedly true that the erection of a new manufacturing plant, in the event of a sale by the Cutlers of the existing plant, was never considered nor contemplated by the parties. But the Court's conclusion based upon that fact is unjustified. It does not follow that the parties intended by the language of paragraph 11 to restrict the rights and remedies of appellee. Even though the fact recited is true, it is likewise true that appellee intended to retain his right to recover damages if the Cutlers voluntarily chose to divest themselves of their means of performing the contract.

The Court, at page 6 of the pamphlet copy of the decision, says:

> ". . . it is manifest from the contract and the circumstances surrounding it, and particularly from the provisions of paragraph 11 thereof, that a sale by the Cutlers of their business would prevent their performance ot the contract, and, consequently, to enforce the contract under the circumstances would be directly contrary to the obvious intention of the parties."

We respectfully submit that the conclusion of the Court from this premise does not follow. It may well be that the parties recognized that if the Cutlers divested themselves of their means of performing the contract, that is, if they sold their manufacturing plant, they would thereafter be unable to perform the contract according to its terms, but it does not follow that to enforce the contract by giving the appellee a right to damages is contrary to the intention of the parties as expressed in the contract.

The Court states further at page 6:

> ". . . It was also known that neither Cook nor the Cutlers could control the action of a third party who purchased the business of the Cutlers. Consequently, the first option to the plaintiff contained in paragraph 11 in the event of such a sale was evidently intended to give him the right to negotiate a satisfactory arrangement for the continuance of the manufacture of plaintiff's machine by the purchasers of the business of the Cutler brothers. In the event he was able to

> make such an arrangement the first option would have required Cutler brothers to transfer the license contract to the purchaser regardless of whether or not the Cutlers desired to continue to manufacture plaintiff's machine under the contract."

The facts recited do not support the Court's conclusion that by paragraph 11 appellee intended to forego the right which he otherwise had to recover damages from the Cutlers in the event of a suspension by them of their performance under the contract. If the Cutlers desired "to continue to manufacture plaintiff's machine under the contract", they were perfectly free to do so and their right to continue was assured to them if they had elected to refrain from selling their business. But the continuance of that right, dependent only upon matters entirely within their control, did not give them the right, as the Court concludes, to terminate the contract at their pleasure.

Further, on page 6, the Court says:

> ". . . The second option in paragraph 11 to the plaintiff permitted him to terminate the contract in case of such a sale of the Cutlers' business regardless of whether or not an arrangement could be made with the purchaser or of whether or not the Cutlers desired to continue under the contract."

Again, we point out that if the Cutlers had desired to continue under the contract, they could have done so

at their pleasure, and it was within their sole power to determine whether or not they should continue to enjoy privileges given to them under the contract. Only by their own voluntary act of selling their business and divesting themselves of the instrument essential to their continued performance, could appellee acquire any right to prevent the Cutlers from continuing under the contract. There is nothing in the fact as recited in the last quotation to indicate an intent of the parties, by any language in paragraph 11, to deprive appellee of the right which he would otherwise have to hold the Cutlers for damages if they chose to suspend performance of the contract.

Finally, on page 6, the Court says:

> ". . . While it is true that the contract did not expressly give the Cutlers the right to terminate the contract in the case of the sale of their business, it is manifest from the contract and the circumstances surrounding it, and particularly from the provisions of paragraph 11 thereof, that a sale by the Cutlers of their business would prevent their performance of the contract, and, consequently, to enforce the contract under the circumstances would be directly contrary to the obvious intention of the parties."

We respectfully submit that the conclusion thus announced does not follow from the premise stated in the beginning of the sentence. We reiterate that the matter of the sale by the Cutlers of their business was a thing entirely within their control and entirely

beyond the control of appellee. Manifestly the voluntary act of the Cutlers in selling their business would make performance of the contract by them impossible, but it does not follow that the parties intended, when they drafted the contract, that appellee should be foreclosed of his right to sue for damages if the Cutlers chose to disable themselves. It does not follow that the Cutlers had the right, to be exercised by them at their pleasure, to terminate the contract.

We submit that it tortures the language of paragraph 11 to say that by the grant of the option to appellee to cancel and terminate the contract, in certain circumstances, the parties thereby intended to grant to the Cutlers the right to terminate the contract at their pleasure. An option is exercisable by a party at his own election and he is thereby given a choice; but here the Court would say that the very grant to appellee of a right to make a choice destroyed his right to elect, and conferred on the Cutlers the right to terminate at their election and without appellee's consent.

The interpretation of the contract with paragraph 11 included gave to the appellee precisely the same rights which he would have had if paragraph 11 had been omitted. The obvious question to ask, then, is why it was included if paragraph 11 added nothing to the rights of any of the parties. With all defer-

ence to the opinion of the attorney, now deceased, who drafted paragraph 11 (Appellants' Brief, p. 35), we believe that appellee was poorly advised when he insisted on the inclusion of paragraph 11. That paragraph was undoubtedly superfluous. It neither added to nor subtracted from the rights which appellee would otherwise have had or the rights or obligations of the Cutlers. It is erroneous to hold, as the Court has, that the language insisted upon by appellee upon the advice of his then attorney, for the purpose of securing to appellee rights which he thought he would not otherwise have, actually evidences an intent on the part of the appellee and the appellants to take away from appellee the very rights he was endeavoring to protect. It is erroneous to conclude that a paragraph insisted on by appellee so that the Cutlers could not "shelve" him, evidences an intent to give the Cutlers a right to terminate the contract, and thus "shelve" appellee.

There is a further point which the Court has overlooked, and this again is the result of our failure to discuss in greater detail the provisions and circumstances of the particular agreement here involved. The additional point requires a consideration of paragraph 8 of the agreement. Paragraph 8 reads as follows:

> "EIGHTH. If either of the parties shall fail to keep and perform diligently and punctually, any of the terms and conditions hereof, the other

> party shall have the right to cancel and terminate this agreement for such breach, provided that before such right of cancellation shall be exercised, the party asserting such breach and claiming such right of cancellation, shall give the other notice in writing specifying such breach with reasonable certainty, and the other party may within thirty days after receiving such notice, make good such breach. If the party receiving such notice shall fail within such period of thirty days to make good such breach, then the other party shall have the right to cancel and terminate this contract, but such cancellation shall not release the other party from any liabilities then existing hereunder."

It must be remembered that the decision of the Court, in its interpretation only of the language of paragraph 11, reads into the contract a right in the Cutlers to terminate the contract upon a sale of their business and to relieve themselves of any further obligations to appellee. It is a cardinal rule of interpretation that in determining the intent of the parties as expressed in a written instrument, a court will examine the entire instrument and determine the intent from the entire document, even though certain parts of the contract considered alone would seem to lead to a different conclusion. *Miller v. Robertson*, 266 U. S. 243, 45 S. Ct. 73; *Sasinowski v. Boston & M. R. R. Co.*, 74 F. (2d) 822. It is likewise a rule of interpretation of contracts that the enumeration of particular things indicates an intent

on the part of the parties to exclude things of the same nature not specifically enumerated. *Andrew Jergens Co. v. Woodbury, Inc.,* 273 Fed. 952 (afd. 279 Fed. 1016). This rule is expressed in the phrase *Expressio unius est exclusio alterius.* Consequently, to determine whether the Court is correct in its decision in reading into paragraph 11 a provision not there expressed, giving the Cutlers the right to terminate under the facts of this case, we must consider the entire contract, and particularly paragraph 8.

Paragraph 8 gives to each party the right to cancel and terminate the contract in the event of a breach by the other party. By this paragraph 8, then, the Cutlers were given a right to cancel and terminate the contract, but only in the event of a breach by the appellee of his obligations as set forth in the contract. Necessarily. then, if appellee was not in any way in default when the Cutlers attempted to terminate the contract in the spring of 1930, they had no right to terminate by virtue of any provision in paragraph 8. Furthermore, the specification in paragraph 8 of the condition upon which the Cutlers would have the right to cancel and terminate the agreement, under the rule that the expression of one is the exclusion of the other, negatives the conclusion of the Court that the Cutlers had the right to terminate the contract for any reasons other than those expressed in paragraph 8. It follows. then,

that the decision of the Court, in reading into the contract a right in the Cutlers to terminate at their pleasure upon a sale of their business—a ground not specified in paragraph 8—is an erroneous construction of the contract.

We respectfully submit that a consideration only of the language of the contract itself and of the circumstances surrounding its preparation and execution requires the conclusion that nothing in the contract deprived appellee of his right, in the event of a sale by the Cutlers of their business and a suspension of performance by them, to treat the contract as still in effect and to hold the Cutlers for damages arising out of their breach. The decision of the Court is erroneous in reading into paragraph 11 a right in the Cutlers, not there expressed, to terminate the contract at their pleasure, upon the sale of their business, and in depriving appellee of the right which every promisee has, whether or not expressed in the contract, to hold the promisor liable for damages in the event of a breach by the promisor. These conclusions, we submit, follow from a consideration only of paragraph 11 and the circumstances under which it was prepared. These conclusions are strengthened by a consideration of the contract as a whole, and particularly of paragraph 8.

## IV.

**The Authorities Are Opposed to the Conclusions Announced By the Court In Its Decision.**

In our brief we cited two decisions of the Supreme Court of the United States and one decision of the Circuit Court of Appeals for the Sixth Circuit, construing language similar to that contained in paragraph 11 of the contract now under consideration. In the present case, paragraph 11 provides that upon the sale by the Cutlers of their business, appellee "shall have the option" either to require the purchaser to assume the contract or to cancel and terminate the agreement. We asserted in our brief that the rights thus given, specifically described as optional, were not the exclusive remedies of appellee. We contended that if he could not negotiate a novation with the purchaser, he might waive his right to terminate the contract and treat the contract as still in effect and sue to recover damages. Since the optional rights were inserted for his benefit (and we think that it has been demonstrated by the testimony reviewed in prior pages that they were inserted for his benefit), he could waive them and still sue and recover damages in the event of a default.

This conclusion is supported by the decisions of the Supreme Court previously cited construing language much less liberal to the plaintiffs than the

language here under consideration. *Stewart v. Griffith*, 217 U. S. 323, 30 S. Ct. 528; *Western Union Telegraph Company v. Brown*, 253 U. S. 101, 40 S. Ct. 460. We likewise cited *Kant-Skore Piston Company v. Sinclair Manufacturing Corporation*, 32 F. (2d) 882, a decision of the Sixth Circuit Court of Appeals, which applies the same rule announced by the Supreme Court in its two decisions. In appellants' brief counsel cited no authority to the contrary and made no attempt to distinguish the cases cited and relied on by us. This avoidance by counsel of any discussion of the authorities is particularly noticeable in view of the fact that these were the three cases cited and relied on by the Master in reaching his conclusions. (R. pp. 769-770).

The Court in its decision takes no notice of these controlling decisions of the United States Supreme Court, and, as a matter of fact, cites absolutely no authority to support its views.

The rule of these cases is the uniform rule of all the Circuits wherein the point has arisen. The Circuit Court of Appeals of the First Circuit applied the rule of the Supreme Court cases in *Fred W. Mears Heel Co. v. Walley*, 71 F. (2d) 876. The Circuit Court of Appeals of the Third Circuit applied the same rule in *Biscayne Shores, Inc., v. Cook*, 67 F. (2d) 144, and likewise in *Burns Mortgage Co. v.*

*Schwartz,* 72 F. (2d) 991. In the Fourth Circuit the rule was applied in *First National Bank v. Glens Falls Insurance Co.,* 27 F. (2d) 64. As we have already pointed out, the rule was applied in the Sixth Circuit in *Kant-Skore Piston Company v. Sinclair Mfg. Corporation, supra.* In the Seventh Circuit, the court considered the rule in *Interstate Iron & Steel Co. v. Northwestern Bridge & Iron Co.,* 278 Fed. 50. In that case the court reached a conclusion contrary to that in *Stewart v. Griffith* because of the finding that the clause in question was not inserted clearly for the benefit of the plaintiff. The court indicated that the result of the case would have been otherwise and that the rule of *Stewart v. Griffith* would have been applicable had the provision in the contract then under consideration relating to cancellation privileges been described as "optional" in the plaintiff. Since the rights granted by paragraph 11 in this case were described as "optional", it follows that the rule in the Seventh Circuit is in accord with the decision we now urge. In the Eighth Circuit, the rule is applied in two cases, in *James B. Berry & Sons Co. v. Monark Gasoline & Oil Co.,* 32 F. (2d) 74, and *Moffat Tunnel Improvement Dist. v. Denver & Salt Lake R. Co.,* 45 F. (2d) 715.

So far as we have been able to determine, the point has been before the court in the Ninth Circuit

in only one case—*Western Union Telegraph Co. v. Lange,* 248 Fed. 656. In that case this Court attempted to distinguish *Stewart v. Griffith,* and declined to apply the rule therein announced by the Supreme Court of the United States. However, that decision in the Ninth Circuit was reversed by the Supreme Court of the United States in *Western Union Telegraph Co. v. Brown, supra,* the case upon which the Master relied and which we cited in our opening brief.

There is some suggestion in the cases that the rule of *Stewart v. Griffith* applies only to contracts involving the sale or leasing of real estate. This was the suggestion made by the Circuit Court of Appeals of this Circuit in *Western Union Telegraph Co. v. Lange, supra,* and a similar suggestion is made in *Sedalia Mining & Mineral Co. v. Sharp,* 300 Fed. 211, a decision of the District Court of Kansas. This suggestion is effectively answered by the decision of the Supreme Court in *Western Union Telegraph Co. v. Brown, supra,* which involved a contract for the sale of corporate stock, and which reversed the decision of this Circuit wherein the suggestion was made. It is likewise answered by the case of *Fred W. Mears Heel Co. v. Walley, supra,* from the First Circuit, involving a contract for the sale of lumber; the case of *Kant-Skore Piston Co. v. Sinclair Mfg. Corporation, supra,* from the Sixth Cir-

cuit involving, as does the case at bar, a contract for license to manufacture under a patent; and *James B. Berry & Sons v. Monark Gasoline & Oil Co.* from the Eighth Circuit, involving a contract for the sale of gasoline.

In conclusion we earnestly submit that the contract in this case prescribed a period of time during which both of the contracting parties were bound to perform. In addition to this, paragraph 11 undertook to give to appellee the right to terminate the contract in the event appellants sold their business to a third party. The result of the Court's decision is to give to appellants the real option to terminate, because the Court has concluded that upon the sale by appellants the contract came to an end. We have searched the contract, the evidence disclosing the intention of the parties, and the applicable decisions, in vain, for anything which would support this result. We earnestly believe that upon a further consideration of the record the Court will reach a different conclusion than that announced in its decision.

We submit that the case should be re-examined and re-heard.

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